A.F.R

HIGH COURT OF CHHATTISGARH AT BILASPUR

(45)

Single Bench : Hon'ble Shri Dilip Raosaheb Deshmukh, J.

Second Appeal No.213 of 2007

Vinod Kumar Thawani and another

versus

Firm Ganeshi Lal Gulab Chand, Partnership Firm: Shankarlal Agrawal and others

JUDGMENT

Post for 26 -11-2007

Sd/-
Dilip Raosaheb Deshmukh
Judge

HIGH COURT OF CHHATTISGARH AT BILASPUR

Single Bench : Hon'ble Shri Dilip Raosaheb Deshmukh, J.

Second Appeal No.213 of 2007

Appellants Defendants

1. Vinod Kumar Thawani, aged about 40 years, S/o Late Shri Mayaram, Vinod Electricals, Near Office of Nagar Palika, Champa, Tahsil Champa, District Janjgir-Champa (C.G.)
2. Sachchanand Thawani, aged about 60 years, S/o Late Shri Mayaram Thawani, Seema General Store, Champa, District Janjgir-Champa (C.G.)

versus

Respondents Plaintiffs

Firm Ganeshi Lal Gulab Chand, Partnership Firm:

1. Shankarlal Agrawal, aged 52 years, S/o Late Shri Maturam,
2. Kailash Prasad Agrawal, aged 48 years, S/o Late Shri Maturam,
3. Gopal Prasad Agrawal, aged 42 years, S/o Late Shri Maturam,
4. Sharda, aged 50 years, D/o Late Shri Maturam,
5. Sita, aged 45 years, D/o Late Shri Maturam,

All R/o Village Naila, Tahsil Janjgir, District Janjgir-Champa (C.G.)

Second Appeal under Section 100 of the Code of Civil Procedure, 1908

Present : Shri Sanjay S. Agrawal, counsel for the appellants.
Shri Rajeev Shrivastava, counsel for respondents No.1 to 3.

JUDGMENT

(Delivered on this 26th day of November, 2007)

In this appeal, the judgment and decree dated 11-05-2007 passed by the Additional District Judge, Janjgir in Civil Appeal No.126-A/2005 is under challenge whereby the appeal against the *ex parte* judgment and

decree dated 10-05-1996 passed in Civil Suit No.4-A/94 by the Civil Judge Class-I, Janjgir was dismissed not only on merits but also on the ground of limitation.

(2) Brief facts are that the respondents/plaintiffs instituted Civil Suit No.4-A/94 for the eviction of the appellants/defendants from the suit accommodation situated in Sadar Bazar, Champa on grounds under Section 12(1)(a) and (b) of the Chhattisgarh Accommodation Control Act, 1961 (hereinafter referred to as 'the Act, 1961'). Despite service of summons of the suit, the defendants remained absent on 04-05-1995 and were proceeded *ex parte* on 20-06-1995. The *ex parte* judgment and decree was passed by the Civil Judge Class-I, Janjgir on 10-05-1996. The appellants/defendants filed an application under Order 9 Rule 13 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'the Code') on 22-06-1998 before the trial Court on the ground that although summons were duly served on the defendants for 4.5.1995 they did not appear in Court because their counsel had informed them that the report of service of summons was not received in Court on 4.5.1995 and thereafter no notice was served on them for the date 28.6.1995 on which date the Court proceeded *ex parte* on the basis of the report of service of summons on the defendants for 4.5.1995. Thereafter, they did not appear in Court and had knowledge of the *ex parte* judgment and decree on 14-05-1998 when the Process Server served the warrant of execution of the judgment and decree on them. The learned Civil Judge Class-I, Janjgir rejected the said application on 07-12-2002. The appellants/defendants preferred Miscellaneous Appeal No.16/2002 before the Additional District Judge, Janjgir, which was dismissed on 29-01-2003. The appellants/defendants preferred Civil Revision No.143/2003 in the High

Court of Chhattisgarh, which was withdrawn by the counsel for the appellants/defendants on the ground that the same was not maintainable in view of the proviso to Section 115 of the Code. The counsel for the applicants prayed for liberty to file appropriate proceedings available under law. The said liberty was granted by the High Court. However, instead of preferring an appeal under Section 96(2) of the Code, the appellants/defendants preferred Writ Petition No.1027/2005, which was dismissed on 08-12-2005. In this manner, it was only after moving from pillar to post that the appellants/defendants preferred First Appeal No.126-A/2005 before the Additional District Judge, Janjgir on 14-12-2005 along with an application under Section 14 of the Limitation Act, 1963 (hereinafter referred to as 'the Act, 1963') for condonation of delay in filing the said appeal. Learned counsel for respondents No.1 to 3 submitted that in the said appeal, stay on execution of the *ex parte* judgment and decree was granted by the Additional District Judge, Janjgir, whereupon the respondents/plaintiffs preferred Writ Petition No.1646/2006 before the High Court of Chhattisgarh, which was dismissed vide order dated 13-04-2006. Against the said order, the respondents/plaintiffs preferred S.L.P. (Civil) before the Apex Court. The S.L.P. (Civil) preferred by the respondents/plaintiffs against the order dated 13-04-2006 passed in Writ Petition No.1646/2006 was disposed of on 16-04-2007 with a direction to the first appellate Court to decide the application for condonation of delay as well as the first appeal, which had been filed by the appellants/defendants herein.

(3) By the impugned judgment and decree, the Additional District Judge dismissed the civil appeal not only on merits, but also on the ground that the appeal was barred by limitation and sufficient cause for

condonation of delay was not shown. It was also held that Section 14 of the Act, 1963 had no application since the appellants/defendants were prosecuting a legal remedy available to them in a Court having jurisdiction. It further held that the appellants/defendants were unable to show sufficient cause for condonation of delay in filing First Appeal No.126-A/2005.

(4) In this appeal, the following substantial question of law arises for determination:

> "Whether on the facts and circumstances of the case, rejection of the application for condonation of delay by the lower appellate Court is contrary to law?"

(5) Shri Sanjay S. Agrawal, learned counsel for the appellants/defendants has argued that although the application filed by the appellants/defendants before the lower appellate Court was titled as under Section 14 of the Act, 1963, it was in sum and substance an application under Section 5 of the Act, 1963. Learned counsel for the appellants/defendants conceded that no application under Section 14 of the Act, 1963 would lie because the appellants/defendants were pursuing the remedy under Order 9 Rule 13 of the Code in a Court having jurisdiction. Reliance was placed on ***Wadhya Mal* vs. *Prem Chand Jain and another*, AIR 1982 SC 18** while arguing that the appellants/defendants were misled in not preferring the appeal simultaneously with the application under Order 9 Rule 13 of the Code for setting aside the *ex parte* judgment and decree. In the abovementioned case, the Apex Court was considering a matter in which an award was passed by the Motor Accidents Claims Tribunal against the owner of the truck involved in the accident, who had remained *ex parte*. An application

for setting aside the *ex parte* award was dismissed and an appeal against the said order was also dismissed as not maintainable. Thereafter, the appellant preferred an appeal against the award, which was obviously time barred and an application for condonation of delay was rejected on the ground that his moving from pillar to post would not be a ground for condoning the delay. The Apex Court in the above situation considered it appropriate to give an opportunity to the appellant to get his appeal admitted on merits because the award, which the owner sought to challenge, was under challenge in two separate appeals preferred by the insurance company and the claimant. In this situation, the Apex Court condoned the delay and directed that the appeal be admitted to file and heard and be disposed of along with the two appeals preferred by the insurance company and the claimant.

(6) Reliance was also placed on ***Shyamal Kanti Danda* vs. *Chunilal Choudhary*, AIR 1984 SC 1732,** in which after passing of an *ex parte* decree, the application under Order 9 Rule 13 of the Code came to be dismissed as not maintainable and the appeal against the said order also failed. The unsuccessful defendant moved an application praying for condonation of delay of 386 days in preferring the appeal on the ground that he was prosecuting under legal advice a remedy in another Civil Court for setting aside the *ex parte* decree under Order 9 Rule 13 of the Code, but as that Court was unable to grant relief, the time spent *bona fide* in prosecuting this remedy should be excluded in computing the period of limitation. The learned first appellate Court declined to condone the delay and dismissed the appeal. After an unsuccessful revision in the High Court, the defendant/petitioner approached the Apex Court under Article 136 of the Constitution. The Apex Court, in exercise of the powers

under Article 136 of the Constitution, directed the petitioner to deposit a sum of Rs.27,000/- as use and occupation charges during the period spent in the trial Court and to further deposit such charges at the rate of Rs.225/- per month from month to month before the 10th day of every succeeding month commencing from July, 1994 till the suit was finally disposed of by the trial Court. It was ordered that on complying with the above conditions, the application for condoning the delay in preferring the appeal in the District Court shall stand allowed and the appeal shall also stand admitted to file and shall also be allowed thereby setting aside the *ex parte* judgment and decree passed by the learned Munsiff disposing of the suit on merits. It was further directed that the defendant/petitioner shall be permitted to participate in the proceedings before the learned Munsiff and the case shall proceed form the stage where it was disposed of in the absence of the petitioner. Certain other directions were also given. Lastly, reliance was placed on ***Balakrishnan* vs. *Ayyaswami*, AIR 1983 Madras 17.** In this case, there was delay in filing the second appeal against an *ex parte* decree passed in first appeal because the appellant/defendant was unsuccessfully prosecuting proceedings under Order 41 Rule 21 of the Code for setting aside the *ex parte* decree. It was held that there was sufficient cause for condonation of delay in filing the second appeal.

(7) On the other hand, Shri Rajeev Shrivastava, learned counsel for respondents No.1 to 3/plaintiffs argued in support of the impugned judgment and decree and submitted that it was open to the appellants/defendants to prefer the first appeal simultaneously with the application under Order 9 Rule 13 of the Code within the period of limitation. The conduct of the appellants/defendants in not filing an appeal

till he pursued his remedy by filing a miscellaneous appeal, civil revision and writ petition clearly shows that the appellants/defendants had no *bona fide* intention of filing an appeal and were, thus, not prevented by any sufficient cause from preferring the appeal within the prescribed period of limitation. Reliance was placed on ***Archana Kumar and another* vs. *Purendu Prakash Mukherjee and another*, 2000 (2) MPLJ 491,** a decision of Full Bench of the High Court of Madhya Pradesh, in which it was held that even after dismissal of the application under Order 9 Rule 13 of the Code, a regular first appeal under Section 96(2) of the Code is maintainable and it is open to the defendant to prefer an application under Order 9 Rule 13 of the Code and a regular appeal simultaneously and to pray for stay of further proceedings in appeal till the application under Order 9 Rule 13 of the Code is decided. It was also argued that the application under Section 14 of the Act, 1963 was not maintainable because the appellants/defendants were prosecuting a remedy available to them under Order 9 Rule 13 of the Code before a Court having jurisdiction. It was also argued that in the application under Section 14 of the Act, 1963, the appellants/defendants had mentioned that pursuant to a direction made in Writ Petition No.1027/2005, they had filed an appeal whereas no such direction was made in Writ Petition No.1027/2005. In this view of the matter, it was contended that the prayer of the appellants/defendants in the application under Section 14 of the Act, 1963 even if it was to be construed as one under Section 5 of the Act, 1963 was not *bona fide* and no sufficient cause for not preferring an appeal within the prescribed period of limitation was shown by the appellants/defendants. It was strenuously contended that the conduct of the appellants/defendants amounted to forum-hunting.

(8) Having considered the rival contentions, I have perused the record of Civil Suit No.4-A/94. Section 5 of the Act, 1963 reads as under:

> **"5. Extension of prescribed period in certain cases.–** Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period, if the appellant or the applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period.
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> *Explanation.–* The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section."

(9) The words "he had sufficient cause for not preferring the appeal or making the application within such period" show that the appellant was required to satisfy the Court hearing the appeal that he had sufficient cause for not preferring the appeal within the prescribed period of 90 days from the date of the *ex parte* judgment and decree. Two legal remedies were available to the appellant. He could move an application under Order 9 Rule 13 of the Code for setting aside the *ex parte* judgment and decree or he could prefer an appeal under Section 96(2) of the Code. There is no such legal requirement that, in such a situation, the defendant, must avail both the legal remedies simultaneously, though he may opt to do so. In ***Archana Kumar and another*** **vs.** ***Purendu Prakash Mukherjee and another*** (supra), the Full Bench of the High Court of Madhya Pradesh has held that it is open to a defendant to prefer an application under Order 9 Rule 13 of the Code and a regular appeal simultaneously and to pray for stay of further proceedings in appeal till the

application under Order 9 Rule 13 of the Code is decided. The moot question is whether an inference of deliberately adopting dilatory tactics or causing delay with intent to frustrate the *ex parte* judgment and decree for eviction of the tenant can be drawn in a case where before filing an appeal under Section 96 (2) of the Code the tenant chooses to exhaust the legal remedy available to him under Order 9 Rule 13 of the Code by pursuing such remedy upto the appellate and revisional Court. It is to be borne in mind that where the time for preferring an appeal or making an application under the Act, 1963 has expired, a valuable right accrues to the opposite party to reap the fruits of the order passed in the *ex parte* judgment and decree and such a right ought not to be allowed to be frustrated in case the delay in resorting to the legal remedy available under law beyond the period of limitation was deliberate and not *bona fide*.

(10) In ***N. Balakrishnan* vs. *M. Krishnamurthy***, **(1998) 7 SCC 123**, the Apex Court has succinctly dealt with the scope of Section 5 of the Act, 1963 as under:

> "**11.** Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. The law of limitation fixes a lifespan for such legal remedy for the redress of the legal injury so suffered. Time is precious and wasted time would never revisit. During the efflux of time, newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the Courts. So a lifespan must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The law of limitation is thus founded on public policy. It is enshrined in the maxim

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interest reipublicae up sit finis litium (it is for the general welfare that a period be put to litigation). Rules of limitation are not meant to destroy the rights of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time."

"**12.** A Court knows that refusal to condone delay would result in foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the Court is always deliberate. This Court has held that the words "sufficient cause" under Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice vide ***Shakuntala Devi Jain v. Kuntal Kumari, AIR 1969 SC 575: (1969)1 SCR 1006*** and ***State of W.B. v. Administrator, Howrah Municipality, (1972) 1 SCC 366: AIR 1972 SC 749.***"

"**13.** It must be remembered that in every case of delay, there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy, the Court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time, then the Court should lean against acceptance of the explanation. While condoning the delay, the Court should not forget the opposite party altogether. It must be borne in mind that he is a loser and he too would have incurred quite large litigation expenses. It would be a salutary guideline that when Courts condone the delay due to laches on the part of the applicant, the Court shall compensate the opposite party for his loss."

(11) Condonation of delay is a matter of discretion. The Apex Court, in ***N. Balakrishnan* vs. *M. Krishnamurthy*** (supra), further went on to say as under:

> "**9.** It is axiomatic that condonation of delay is a matter of discretion of the Court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to a want of acceptable explanation whereas in certain other cases, delay of a very long range can be condoned as the explanation thereof is satisfactory. Once the Court accepts the explanation as sufficient, it is the result of positive exercise of discretion and normally the superior Court should not disturb such finding, much less in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. But it is a different matter when the first Court refuses to condone the delay. In such cases, the superior Court would be free to consider the cause shown for the delay afresh and it is open to such superior Court to come to its own finding even untrammelled by the conclusion of the lower Court."

(12) Bearing in mind the principle laid down by the Apex Court in ***N. Balakrishnan* vs. *M. Krishnamurthy*** (supra), upon scanning the material available on record, it can safely be held that the conduct of the appellant in not pursuing the legal remedy available to him under Section 96(2) of the Code was a dilatory tactics adopted by him to frustrate the *ex parte* eviction decree in favour of the landlord.

(13) The appellant first preferred an application under Order 9 Rule 13 of the Code. On its rejection, preferred a miscellaneous appeal under Order 43 Rule 1(d) of the Code, thereafter, upon its dismissal, went on to prefer a civil revision. Civil Revision No.143/2003 was dismissed as withdrawn by the appellant and although liberty was granted to avail the appropriate legal remedy, the appellant filed a writ petition under Article 226 of the Constitution instead of preferring a regular appeal under Section 96(2) of the Code.

(14) It is true that once an *ex parte* judgment and decree is passed against a defendant, he would normally prefer to avail the remedy under Order 9 Rule 13 of the Code to set aside such decree. The limitation for preferring an application under Order 9 Rule 13 of the Code is 30 days under Article 123 of the Act, 1963, whereas the limitation for preferring an appeal under Section 96(2) of the Code against an *ex parte* judgment and decree is 90 days under Article 116 of the Act, 1963. However, it may be that the application under Order 9 Rule 13 of the Code is decided after the period of 90 days from the date of the *ex parte* judgment and decree. Therefore, in every case, where the defendant first avails the remedy under Order 9 Rule 13 of the Code and the decision on the said application is given after the expiry of 90 days, it cannot be said that an appeal under Section 96(2) of the Code preferred thereafter along with an application under Section 5 of the Act, 1963, would be liable to be dismissed for want of sufficient cause for condonation of delay because the appellant/defendant was not prevented by sufficient cause from preferring an appeal under Section 96(2) of the Code within the period prescribed. Exercise of discretion to condone the delay would, therefore, depend on the facts and circumstances of each case. In the present case,

the appellants/defendants availed the remedy under Order 9 Rule 13 of the Code from pillar to post. The filing of Writ Petition No.1027/2005 by the appellants/defendants clearly goes to show that despite rejection of the application under Order 9 Rule 13 of the Code, the miscellaneous appeal and the civil revision, the appellants/defendants had no intention whatsoever of preferring an appeal under Section 96(2) of the Code against the *ex parte* judgment and decree. This conduct of the appellants/defendants clearly goes to show that there was no sufficient cause, which prevented the appellants/defendants from preferring an appeal under Section 96(2) of the Code within the period of limitation prescribed by law.

(15) It is also to be noticed that the application filed under Section 14 of the Act, 1963 for condonation of delay did not lie because the appellants/defendants were pursuing the legal remedy under Order 9 Rule 13 of the Code in Courts having jurisdiction and not in a wrong forum. Considering its substance, even if the said application though titled under Section 14 of the Act, 1963 is construed as an application under Section 5 of the Act, 1963, it would appear that in paragraph 1 of the application, the appellants/defendants mentioned that the defendants had filed an appeal under Section 96(2) of the Code in pursuance to a direction given by the High Court in Writ Petition No.1027/2005 for filing an appeal, whereas no such direction was given in the order dated 08-12-2005 passed in Writ Petition No.1027/2005. Paragraph 1 of the said application dated 14-12-2005 leaves no room for any doubt that till rejection of the writ petition by the order dated 08-12-2005, the appellants/defendants had no intention of filing an appeal under Section 96(2) of the Code for setting aside the *ex parte* judgment and decree dated 10-05-1996. Thus, for a

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long duration of over 9 years, the appellants/defendants were pursuing the remedy under Order 9 Rule 13 of the Code from pillar to post.

(16) The case law cited by the learned counsel for the appellants is distinguishable because in ***Shyamal Kanti Danda*** **vs.** ***Chunilal Choudhary*** (supra), the Apex Court, in the special circumstances of the case, exercised the powers under Article 136 of Constitution of India and issued certain directions. In ***Wadhya Mal*** **vs.** ***Prem Chand Jain and another*** (supra), in a motor accident case the appeals preferred by the insurance company and the claimants were pending. In the above circumstances, the Apex Court considered it proper, as a special circumstance, to give an opportunity to the appellant-owner to get his appeal admitted on merits and on this count condoned the delay. In the case of ***Balakrishnan*** **vs.** ***Ayyaswami*** (supra), the appeal was decided *ex parte* against the petitioner/respondent and the petitioner after unsuccessfully pursuing the remedy under Order 41 Rule 21 C.P.C. preferred an appeal on merit. However, in the present case, the conduct of the appellants/defendants right from the service of summons of suit shows that they were adopting dilatory tactics. The appellants/defendants remained absent despite service of summons in the suit for 04-05-1995. They concocted a story that their counsel had instructed them not to appear in the Court as the report of service of summons had not been received. Thus, the defendants deliberately absented on 4.5.1995 despite service of summons upon them. The cause shown by them could not be substantiated because according to the appellants/defendants, their counsel was dead. This was the ground for the rejection of the Writ Petition No. 1027 of 2005 on 08.12.2005. The appellants/defendants, despite service of summons, did not participate in the proceedings in the

suit till its final adjudication on 10-05-1996 and filed the application for setting aside the *ex parte* judgment and decree as late as on 14-05-1998 on the ground that they had knowledge of the suit when the warrant of execution of the judgment and decree was served on them. Thus, the appellants/defendants adopted dilatory tactics right from the beginning of the suit. Not only this, the appellants/defendants in the application under Section 14 of the Code made a false assertion that upon a direction given in W.P.No.1027 of 2005 they were constrained to file an appeal. Thus, in the facts and circumstances, the appellants/defendants have utterly failed to satisfy the Court that they were prevented by sufficient cause from preferring an appeal under Section 96(2) of the Code within period of limitation prescribed by law.

(17) In this view of the matter, the learned Additional District Judge, Janjgir was right in refusing to condone the delay in filing appeal and dismissing the appeal as barred by limitation. Substantial question of law is, thus, answered in the negative.

(18) In the result, the appeal fails and is accordingly dismissed.

Sd/-
Dilip Raosaheb Deshmukh
Judge

26-11-2007

Gopal